Appellants' Authorities.—Stewart, July 24. 1623, (11,439); Stirling, June 20. 1704, (11,442).

Respondent's Authorities.—(3.)—3. Stair, 843.; 3. Ersk. 9. 16.; Sorlies, Dec. 5. 1771, (5947.); Hogg, July 16. 1804, (No. 2. App. Legitim.)

J. RICHARDSON—A. MUNDELL, Solicitors.

(App. Ca. No. 68.)

June 16. 1824.

MAXWELL HYSLOP and Company, and WELLWOOD and MAXWELL HYSLOP, Appellants.—*Adam—Jameson—M'Neill.*

DAVID GORDON, Respondent.—*Wetherell—Shadwell.*

No. 53.

Et e Contra.

Jurisdiction—Interest—Process.—A party who was a native of Scotland, but resident at New-York as a merchant, having brought an action before the Court of Session against two Scotsmen carrying on business in Jamaica, in regard to transactions which took place in America and the West Indies, without founding a jurisdiction; and having concluded against them for payment of a sum in sterling money, with the legal interest thereon; and the Court of Session having, under the circumstances of the case, sustained their jurisdiction; and the parties having then gone into a long and intricate litigation; and the Court having decerned for a sum in dollars, (being the money in which the accounts were kept), and found, that under the conclusions of the summons the pursuer could not insist for American interest; —The House of Lords refused to open up the question of jurisdiction; found that decree should have been given in sterling money; that interest at five per cent was due on the principal; and in part reversed the judgments as to the amount of the principal sum.

June 16. 1824.

2D DIVISION.
Lord Polkemmet.

THE respondent, David Gordon, was a native of Scotland, but left that country early in life, and in 1799 settled in New-York as a merchant. The appellants, Wellwood and Maxwell Hyslop, were also natives of Scotland, the former of whom settled in Kingston of Jamaica as a merchant, and Maxwell, after having gone to New-York, and been educated there as a merchant by Gordon, entered into partnership with his brother at Kingston, under the firm of M. Hyslop and Company. Their father had been proprietor of an estate in Dumfries-shire, which he sold, and L.2000 of the price were retained by the purchaser to meet an annuity constituted on the estate, and to which sum, on their father's death, they acquired right. Various commercial transactions took place between Hyslop and Company and Gordon, of a very complicated and intricate nature, and of which it is only necessary to notice as much as may be

June 16. 1824. necessary to render the judgment which was ultimately pronounced intelligible.

With the view of carrying on their trade between Kingston and New-York, Hyslop and Company purchased an armed vessel called the Agnes. This vessel they sent to New-York, where she arrived at a time when Wellwood Hyslop was there. Gordon was desirous to have taken a third share of her; but it was found that he could not do so consistently with the Registry Acts. He, however, joined as a partner in a cargo which was shipped on board of her for Bermuda. At this time St Domingo was engaged in hostilities with Britain, but was at peace with America; and an agreement was entered into by Wellwood Hyslop, (which, after his departure from New-York, was subscribed by Gordon as his attorney), by which it was arranged that the Agnes should convoy an American ship, the Huntress, to St Domingo in safety. She accordingly did so; but this having been discovered at Bermuda, she was seized by a British ship of war, together with her cargo, and condemned for illegally acting as the convoy of a neutral vessel to a hostile port; and, in consequence of this, it was stated that the underwriters, who were not made aware of the above agreement, refused to settle for the loss. An appeal was afterwards taken against this condemnation, and a compromise was made by the captors, who agreed to give up the vessel on payment of a sum of money.

In the course of their transactions certain bills of lading of a cargo intended to be shipped by Hyslop and Company were transmitted to Gordon, who on the credit of them raised a sum of 5000 dollars, and at the same time granted his promissory-note for the amount, which was indorsed by a Mr Auchinvole in farther security, and thereupon delivered to the parties who had advanced the money. The shipment was never made; and the promissory-note was retired by Auchinvole, who delivered it to Hyslop and Company, for which they claimed credit in account with Gordon.

On the 28th December 1808, while Gordon was still in New-York and the Hyslops in Jamaica, he, with a mandatory, raised an action before the Court of Session, alleging that the Hyslops were indebted to him in L.6000, and concluding 'that the said Wellwood Hyslop and Maxwell Hyslop, defen-'ders, jointly and severally, ought and should be decerned and 'ordained, by decree of the Lords of our Council and Session, 'to make payment to the pursuer and his said attorney of the 'said sum of L.6000, with interest thereof from the date of

'citation to follow hereupon; or at least to render a just and true 'account and reckoning with and to him, for their several dealings and transactions with him and on his account, and sums 'received by them from or for him, and to make payment of 'the balance, amounting to said L.6000 at the date of citation hereto, or to whatever other sum, more or less, the same 'may be found then to amount, including interest during the 'currency of their accounts, as usual on such transactions and 'accounts, and with the legal interest of the balance from the 'date of citation hereto during the not-payment of the same.' The summons was executed edictally; and at first, no appearance being made, decree passed in absence. In virtue of this summons arrestments were executed in Scotland, and Gordon also attached certain funds belonging to the Hyslops in the hands of one Dallas in America. Appearance was thereafter made by the Hyslops, who contended, that as all the parties were resident abroad, and as the whole of the transactions had taken place out of Scotland, the Court of Session had no jurisdiction. On the other hand, it was stated by Gordon, that as the parties were native Scotchmen, and the Hyslops had right to property in Scotland, which he had arrested on the dependence of the action, and as both he and one of them had returned to Scotland since the action was instituted, the Court had jurisdiction.

June 16. 1824.

The Lord Ordinary, on the 28th November 1809, repelled this defence; and the Court, on the 30th May 1810, 'in the 'particular circumstances of this case, adhered to the interlocutor 'complained of, in so far as it sustains the competency of the 'action.'

No appeal was at this time taken against this judgment, and the parties then entered upon the merits, which gave rise to a very extensive and voluminous discussion, in the course of which the case was four times remitted to an accountant, and about twenty special interlocutors were pronounced by the Court, the last of which was dated on the 1st of March 1821. In regard to the question relative to the Agnes, the Court found, that Gordon was not liable for any part of the loss upon the ship; but that he was liable for a third share of the loss of the cargo. As to the promissory-note, which had been retired by Auchinvole, they found, that the Hyslops were entitled to take credit for the amount of it, provided they found satisfactory security to relieve Gordon of all claims connected with it and the bills of lading: that Gordon, on the other hand, was bound to find security to repay to

June 16. 1824.

Hyslops whatever sums he might recover by virtue of his attachments in America: that Hyslops were not entitled to deduction of a sum of L.414. 6s. 11d. which Gordon had received from a Company of the name of Hughes and Duncan: that a balance of 1856 dollars 93 cents of principal was due to Gordon as on the 28th December 1808; but from which there fell to be deducted certain sums which he had recovered under interim decrees; and found, 'that conformably to the conclusions of the 'libel in this cause, the pursuer is not entitled to any higher rate 'of interest, after citation, than 5 per cent, being the legal rate 'concluded for.' Both parties thereupon appealed,—Hyslops, in regard both to the competency and merits of the cause; and Gordon also upon the merits and restriction of interest to that of 5 per cent, which, he contended, should have been 7 per cent, being American interest.

The House of Lords pronounced this judgment:—'The 'Lords Spiritual and Temporal in Parliament assembled, find, 'according to the third supplemental report of the accountant, 'that the balance due to the respondent in the original appeal 'on the 28th of December 1808, calculated in dollars payable in 'New-York, was 20,867 dollars 50 cents, whereof 18,056 dollars '93 cents are principal, and 2810 dollars 57 cents are interest. 'And the Lords further find, that it ought to be ascertained and 'found how much the said balance amounted to in sterling mo- 'ney in Great Britain on the 28th December 1808. And the 'Lords further find, that the appellants in the original appeal 'are entitled to deduction from the said balance, when so ascer- 'tained as aforesaid, together with such interest thereon, as here- 'in after directed, of the sum of L.414. 6s. 11d. received by the 'said respondent from Hughes and Duncan on the 10th of July '1809, and also of the sums received by the said respondent in 'virtue of interim decrees of the Court. And the Lords fur- 'ther find, that provided the said appellants shall, within such 'time as the Court shall appoint, find security satisfactory to 'the said Court to relieve the said respondent of all claim against 'him connected with his bill or note to Mr Auchinvole for '5000 dollars, at the instance of the said Mr Auchinvole, or any 'person in his right, by virtue of the bills of lading mentioned in 'the answers to the objections against the second supplemental 'report, they shall in that case be entitled to a further deduction 'from the said balance of the said 5000 dollars of principal, and 'interest thereof, at 7 per cent, from the 6th of September 1808, 'and the 28th December thereafter—the amount thereof on the

'said 28th of December to be ascertained in sterling money of Great Britain, without prejudice to any claims competent to the said respondent upon the said bills of lading, and for recovery of the same from whoever may be possessed of the same, as accords of law. And the Lords further find, that the said respondent, before extract, must find caution to the satisfaction of the said Court of Session to repay to the said appellants whatever sums shall be received by him or his attorney in America, in virtue of the attachments in Mr Dallas's hands, in so far as he may thereby recover more than the payment of the sums to be ultimately found due to him. And the Lords further find, that the said respondent is entitled to interest at the rate of 5 per cent, from and after the 28th December 1808, on the sum of 18,056 dollars 93 cents, estimated in sterling money of Great Britain as aforesaid, to the time of the final decree to be pronounced by the said Court—due allowance being made for the sums directed to be deducted therefrom as aforesaid, for which credit is to be given from time to time as the same were respectively received, and interest on the sum due at the time of the final decree from thence till payment. And the Lords further find the said respondent entitled to the expenses of process in the Court of Session, subject to modification. And it is ordered and adjudged, that the said interlocutors complained of, so far as they are inconsistent with the above findings, be, and the same are hereby reversed. And it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be consistent with this judgment, and as shall be just.' June 16. 1824.

LORD GIFFORD.—My Lords, There is one other case, on which I shall not detain your Lordships very long,—a case which occupied undoubtedly a great portion of your Lordships' time—a case which one cannot but lament it is necessary to bring before your Lordships. It is the case of Hyslops *v.* Gordon. My Lords, this was an appeal on the part of the appellants against, I think, no less than nineteen interlocutors of the Court of Session; and, on the part of the respondents, parts of those interlocutors were also appealed from. This cause comes on before your Lordships on both appeals.

My Lords,—It is not my intention, undoubtedly, to detain your Lordships by going through the whole of this most complicated case. The appellants, who are brothers, were engaged in a great number of commercial transactions, from the year 1803 to the years 1806 and 1807, with the respondent Mr Gordon, who was a merchant, and at that time resided at New-York. My Lords, transactions to a very

June 16, 1824. large amount took place between them, and a balance being considered by Mr Gordon to be due to him in the year 1808, he commenced an action in the Courts of Scotland against the Messrs Hyslop, to recover the balance which he alleged to be due to him. My Lords, the appellants not being at that time in Scotland, a decreet in absence was pronounced; but they afterwards came in and took a preliminary objection to this action that this decree was improperly pronounced; that the Courts in Scotland had no jurisdiction over the case, as they were not resident in Scotland, nor had any property there enabling the Court to have jurisdiction over them. I should state to your Lordships, however, that so long ago as the year 1810 those defences were finally repelled; and that after the year 1810, down to the year 1820, when I think the last interlocutor was pronounced, proceedings occupying these two volumes took place in the Courts in Scotland upon the subject of this cause. My Lords, upon the subject of the preliminary objection, I must confess that time and reflection have not altered the opinion I at first formed, that that objection, if it be one, should have been brought before your Lordships by appeal, within a limited period after 1810, for it was a defence that went to the whole action. If it had been decided in favour of the appellants that they were not liable to the jurisdiction, there would have been an end of the whole; and it is clear an appeal might have been brought into your Lordships' House by the present appellants. The defences were not sustained, but were repelled: Being repelled, it appears to me it was incumbent on the appellants to bring that before your Lordships within the time limited by Act of Parliament, which has not been done; independently of which they go on, as I stated to your Lordships, from the year 1810, when this preliminary defence was repelled, they go on in proceedings occupying these two volumes without any reference to this preliminary objection. Independently of that, I think a great deal might be said upon the question of the Court having jurisdiction originally over this cause. However, my Lords, I do think that, under the circumstances of this case, those interlocutors cannot now be questioned.

My Lords,—The Court of Session, in the early stage of this proceeding, as the only mode of getting at the justice of the case, referred all those accounts to an accountant. He made a very long and elaborate statement of the accounts. Great fault was found with him for not only deciding matters of fact, but questions of the law of America; the consequence of which was, that though the report was brought before the Court of Session, it was again referred and again brought before the Court of Session; and there were four reports. Objections many in number were made, more particularly to various items in respect of the ship Agnes;—in fact, that formed the principal ground of objection to the decision of the Court of Scotland. That vessel having taken on board a cargo, was afterwards seized, in consequence of being supposed to be concerned in a transaction subjecting her to forfeiture, and her cargo condemned, and she was then repurchased by

Messrs Hyslops. They first of all endeavoured to make out that Mr Gordon was originally a partner in the vessel itself, as well as in the cargo. The Court of Session determined, that he was liable only as to the cargo and not the ship, and they decided, that the illegality of the transaction was not made out, and that therefore the sum was well charged against the appellants. There were a variety of other objections, on which great difference of opinion at one time prevailed in the Court below; but finally, in the year 1820, they adopted the final report of the accountant, by which he found that the sum of D. 18,056. 593 cents for principal were due on the 28th December 1808, which, I take it, was the commencement of these proceedings, and D. 2810. 50 cents for interest. The Court of Session, my Lords, adopted this report, and they found, that the balance reported by the accountant as due to the pursuer on the 28th of December 1808, and payable in dollars at New-York, was the sum I have mentioned for the principal, and the sum I have mentioned for interest; and the effect of their decision is ultimately to determine in favour of Mr Gordon for that sum, subject to certain deductions mentioned in the interlocutor. June 16. 1824.

My Lords,—It is known to your Lordships to be the practice of this House, that where judgments are affirmed, it is not always the habit to pronounce the reasons why they are affirmed; and, my Lords, if I were in this case to travel through those minute accounts, and state all the points which have been made, I should occupy your Lordships almost as long as the original hearing of the appeal. With all the attention I have been able to pay to the case, attended with difficulties as it is, I cannot help thinking substantial justice has been done by the final report of this accountant, as far as that balance is concerned. I think the objections made have been well answered in the papers below, as well as at your Lordships' bar.

It is admitted, that if the appellants are right in respect of the ship Agnes, that would have turned the balance the other way: but I think on that subject the decision of the Court of Session was perfectly right. It does not appear to me that Mr Gordon was liable for that vessel, though he was liable for his share of the cargo; nor do I think that transaction was illegal so as to debar him from the claim he has made against these parties. It appears that, though the ship was condemned, yet there was afterwards, on the appeal to this country, a compromise between the captors and Messrs Hyslop, and actions, or at least claims, are now existing on the policy of assurance.

But, my Lords, undoubtedly the Court of Session have got into a difficulty, from which it is impossible for this House to relieve the parties without sending this case back:—these accounts were kept in dollars; the claim in Scotland was a claim for a balance in sterling money; the Court of Session find, that this sum is due in dollars, payable in dollars at New-York. Now, how is it possible for the appellants to carry into effect this judgment? how is the respondent to obtain this sum in dollars payable in New-York? There would be a

June 16. 1824. great contest between these parties as to the rate of exchange, and the sum payable in this country. The payment cannot be enforced in New-York, and undoubtedly the Court of Session should have done that in this case, which it is the habit of this country to do when an action is brought for a sum of money recovered in foreign money,—they should have ascertained what is to be paid in this country; and therefore; undoubtedly, this House must remit the case back, in order that that sum may be ascertained in British money which is due from the one party to the other.

My Lords,—Another difficulty has occurred in this case, in consequence of another appeal which your Lordships have decided. Mr Gordon, the respondent, had received the sum of L.414 from persons of the names of Hughes and Duncan at Liverpool, on account of Messrs Hyslop. On the contrary, it appeared that Hughes and Duncan at Liverpool had received from Messrs Hyslop only this sum of L.414, but they had afterwards paid bills for Messrs Hyslops to that amount; so that they had paid L.800, having only the L.400 in their possession. They afterwards brought an action against Mr Gordon and Messrs Hyslops, to recover back the sum of L.400 they had overpaid. It is perfectly clear they had a right to recover it from Messrs Hyslop. Mr Gordon resisted the demand of it from him, saying, It is clear it was due to me, therefore you, Messrs Hughes and Duncan, have no right to recover it back from me. At the time this cause was before the Court of Session, that cause was also depending before the Court of Session; but it so happened, that before this cause was decided, they decided that; and they decided that in which this House have not acquiesced,—that Mr Gordon was bound to repay that L.400. Of course, if he repaid the L.400 to Hughes and Duncan, Hyslop would not be entitled to credit for it in the account with him; and therefore, in 1820, they 'supersede consideration of the question, 'whether the defenders are entitled to deduction of L.414. 6s. 11d. 'sterling, recovered by the pursuer from Hughes and Duncan on the '10th July 1809, until a process relative to the pursuer's right to 'retain that sum, which has been taken to report by Lord Bannatyne, 'Ordinary, be advised by the Court.' Then, when they came to a final decision on the 1st of March 1821, they 'find, in respect of the 'judgment of the Court pronounced this day in the process at the 'instance of Hughes and Duncan against David Gordon and Max-'well Hyslop, that the defenders are not entitled to deduction in this 'accounting of the sum of L.414. 6s. 11d. sterling, received by the 'pursuer from Hughes and Duncan on the 10th of July 1809.' They were not entitled, undoubtedly, to credit for it, if Mr Gordon was obliged to repay that sum to Hughes and Duncan. Your Lordships, however, have reversed that finding.* It is clear that Messrs Hyslop

* See ante, Vol. II. p. 310.

are entitled to credit for the L. 414 which Gordon received from Hughes and Duncan on their account, and therefore that makes an alteration in the amount.

June 16. 1824.

My Lords,—In the interlocutor of November 1820, there were several provisions made, which, it is stated, were not unusual in the Court of Session when accounts are finally adjusted, particularly with respect to a sum of money on a bill, that they shall give satisfactory security to the pursuer to relieve him from any claim on that sum, he to be entitled to credit for that sum, that security being first given to the satisfaction of the Court; there is also security to be given by Mr Gordon. 'Of new find, that the pursuer must, before extract, find 'sufficient caution to repay to the defenders whatever sum shall be 'received by the pursuer or his attorney in America, in virtue of 'attachments in Mr Dallas's hands.'

My Lords,—Really, after looking through these various interlocutors, it appears to me, that in order to get at substantial justice, and to put an end, if possible, to this litigation, which has now been depending ever since the year 1808, it will be necessary for your Lordships to come at some determinate finding, which, being remitted to the Court of Session, will enable them finally to adjust the account, which cannot be adjusted in your Lordships' House.

There was one point made by the respondent the principal subject of his cross appeal, which is on the subject of interest. It appears that the Court of Session calculated interest at 7 per cent, which would have been the rate of interest payable between the parties in America, on the balance due at the time this action was commenced; but they thought that, according to the summons of the respondent, (the pursuer in the action), he was entitled only to 5 per cent from the time the action got into Court to final judgment. I think the Court of Session have adjudged rightly upon this point,—it is not my intention, therefore, to propose any alteration upon that subject; but I have drawn out a very long judgment, which I will submit to your Lordships to-morrow morning. I will just state what the subject of it will be:—To find that, according to the third supplemental report of the accountant, the balance due to the respondent on the 28th day of December 1808, calculated in dollars payable at New-York, was 20,867 dollars 50 cents, whereof 18,054 dollars 93 cents are principal, and 2,810 dollars 57 cents are interest—that is the sum which the accountant has stated. Find, that it ought to be ascertained and found, how much the said balance amounted to in sterling money of Great Britain on the 28th day of December 1808. Then, my Lords, to find that the appellants are entitled to a deduction from the said balance, when so ascertained, of the sum of L. 414. 6s. 11d., received by the respondents from Hughes and Duncan on the 10th July 1809, and also of all the sums received by the respondent in virtue of interim decrees of the Court. My Lords, in the course of the proceeding, the Court of Session being satisfied that there was a very large sum due to Mr Gordon, made

June 16. 1824.

interim orders for sums within the balance for which they will undoubtedly be entitled to credit. Then to find, that provided the appellant shall, within such a time as the Court of Session shall appoint, find security satisfactory to the said Court to relieve the respondent of all claim against him connected with his bill or note to Mr Auchinvole for 5000 dollars, at the instance of the said Mr Auchinvole, or any person in his right, by virtue of the bills of lading mentioned in the answer to the objections against the second supplemental report, they shall in that case be entitled to a farther deduction from the said balance of the said 5000 dollars, the principal and interest thereof, at 7 per cent, from 6th September 1808 to 28th December thereafter; that is, adopting the interlocutor of the Court of Session; without prejudice to any other claims competent to the respondent upon the said bills of lading, and for recovery of the same from whomsoever may be possessed of the same, as accords of law. Find, that the respondent, before extract, must find sufficient caution to repay to the appellants whatsoever sums shall be received by him, or his attorney in America, in virtue of attachments in Mr Dallas's hands, in so far as he may thereby receive more than full payment of the sums to be ultimately found due to him; which is part of the interlocutor of the 23d of November 1820, which does not appear to be much quarrelled with at the Bar. Then find, that the respondent is entitled to interest at the rate of 5 per cent from and after the 28th December 1808, on the sum of 18,056 dollars 93 cents, balance of principal, as estimated in sterling money of Great Britain as aforesaid, to the time of the final decree; due allowance being made for the sums directed to be deducted therefrom as aforesaid, and interest on the principal sum due at the time of the final decree, from thence till payment. Then to reverse the interlocutors complained of, so far as they are inconsistent with these findings; and remit the cause to the Court of Session, to do therein as shall be consistent, and as shall be just between the parties.

My Lords,—I entertain a hope that these findings will be the means of closing this litigation between the parties, which undoubtedly is very much to be wished. It has been my object to prepare such a judgment for your Lordships to adopt, as shall have that effect. Whether or not I shall have succeeded, it is hardly possible for me to state, when I look at the voluminous nature of these proceedings; but I think, having fixed the balance due at the commencement of the transactions, and the credit the parties are entitled to, there is a foundation laid for a very speedy termination of this cause, when the Court shall have ascertained the amount in English money, on which the Court will have easy means of information as to the rate of exchange at the time. It appeared to me this was the best mode of adjusting this most complicated and difficult case between the parties, and the best mode of putting an end to the litigation which has so long existed between them.

Appellants' Authorities.—(*Competency.*)—Galbraith, November 15, 1626, (4430.); Blantyre, Dec. 8. 1626, (4813.); Brog's Heir, March 23. 1639, (4816.); Anderson, July 1747, (4779.); 1. Ersk. 2. 19.; Hist. Law Tracts, 252. *Respondent's Authorities.*—(*Interest.*)—Bodilly *v.* Bellamy (2. Burr. 1094.); Campbell, Feb. 15. 1809, (F. C.)

A. MUNDELL—A. GORDON,—Solicitors.

(Ap. Ca. No. 69.)

June 16. 1824.

Trustees of Sir JOHN L. JOHNSTONE, Appellants.—*Warren*—*Fullerton.* WILLIAM ELLIOT, Respondent.—*Baird.*

No. 54.

Process.—Circumstances under which it was held, (affirming the judgment of the Court of Session), 1. That a party who had been employed to erect buildings, and had rendered an account, and raised a summons for a certain sum as due to him, was entitled to amend his summons, so as to conclude for a larger sum reported by valuators to be due to him; and, 2. That an amendment of the libel, which was lodged after the report of the valuators, had been acquiesced in by the defender, and therefore could not be objected to as incompetent.

June 22. 1824.

2D DIVISION. Lord Pitmilly.

IN 1808, Sir John Lowther Johnstone employed William Elliot, architect in Kelso, to make certain alterations and additions to his mansion-house at Westerhall. With this view, Elliot furnished to Sir John, plans, specifications, and estimates, but no formal contract was entered into. Besides the operations upon the mansion-house, Elliot was subsequently employed to erect a new kitchen, an ice-house, farm-offices, and many other pieces of work which had not been originally contemplated. In the course of executing the work, a dispute having taken place between them, Elliot, on the 24th July 1810, wrote to Sir John, that 'he had no objection that, instead of the sums charged in my 'estimates, the whole be submitted to the measurement and arbi-'tration of two men of skill, mutually chosen, to settle between us 'for the whole concern from the beginning.' To this Sir John answered on the 27th, that 'I certainly approve highly of your 'proposal for us to have two men mutually chosen, with power, 'if they disagree, to call in a third, and settle the whole concern 'from the beginning.' The operations were continued, but frequent complaints were made by Elliot, that he was not supplied with money to enable him to carry them on. In March 1821, Mr Ure, writer to the signet, Sir John's agent, wrote to Elliot, that it was proposed to grant him a bond of L.1000;

June 22. 1824. and at the same time he stated, that 'I beg you will send me a 'state of your accounts with Sir John Johnstone from the com-'mencement up to the present time, together with copies of any 'agreements you may have had with Sir John on the subject of 'the different buildings at Westerhall.' Elliot accordingly, on the 21st, transmitted an account, shewing that the total amount was L.2633. 4s. 8d., and that, after deducting partial payments, there was a balance in his favour of L.1383. 4s. 8d. independent of a claim which he had for foreign timber. This account, he afterwards alleged, was intended as a mere sketch, to shew that at least the full sum for which it was proposed to grant the bond was owing to him. The bond was accordingly granted, and the works were finished soon thereafter. Sir John died in the course of the year 1812, having appointed the appellants his trustees; and Elliot being unable to get a settlement, raised an action, in which he concluded, that the trustees should be ordained 'to name a sworn measurer to examine and measure 'the buildings and other works executed by the pursuer for the 'said Sir John Lowther Johnstone, and to fix a certain short 'day for such person so to be named by them to meet the pur-'suer, and a measurer to be named by him, to measure the 'whole buildings and other works executed by the pursuer for 'the said deceased Sir John Lowther Johnstone, that the price 'or value thereof may be ascertained and paid to the pursuer,' &c. 'and to make payment to the pursuer of the full price or value 'of said buildings, and other works executed by him as aforesaid, 'as the same shall be ascertained by the measurement of the 'several parts thereof,' &c.; and 'that, if the said defenders shall 'delay or refuse to name a measurer, or to fix a day for the 'measurement to take place as aforesaid, or shall refuse to pay 'the price or value of said works, after the same shall be mea-'sured, and the value thereof ascertained after the measurement 'is completed, the said defenders ought and should be decerned 'and ordained, by decreet foresaid, to make payment to the 'pursuer of the sum of L.3300 sterling,' &c. under deduction of partial payments.

In defence the trustees pleaded, that Elliot was bound to abide by the account which he had rendered, shewing that the total cost, instead of being L.3300, was only L.2633, and that the balance due to him was L.1383, from which there fell to be deducted the bond for L.1000, and certain other partial payments, leaving an ultimate balance of only L.83; and that he

was not entitled to have the value ascertained by a remit to tradesmen. June 22. 1824.

The Lord Ordinary, on advising the case, issued the following note:—'The Lord Ordinary has read the correspondence and whole process, and is of opinion, that a remit must be made to tradesmen to measure and calculate the price of the buildings executed at Westerhall. The remit may be before answer, but the Lord Ordinary thinks, on perusing the whole of the letters, that the pursuer is not bound by the statement of accounts contained in the letter of 21st March 1811. The pursuer had, it appears, given in estimates, but finding Sir John not quite satisfied, he offered, in the letter of 24th July 1810, to submit the work to the measurement and arbitration of neutral persons. This was agreed to by Sir John. The pursuer afterwards, in his letter of 21st March 1811, to Mr Ure, sent an account of what would have been due according to the estimates, (and he could make it out in no other way); but these estimates had been rejected, and a different mode of settlement agreed to. Sir John could not have been compelled by the pursuer to settle by estimates, neither can the pursuer be bound by them. The remit, however, may be made before answer, and the cause may be enrolled for the Lord Ordinary's next hour, in order that the terms of the remit may be adjusted, and the measurers named.' Accordingly, his Lordship afterwards, before answer, remitted to an architect and a sworn measurer, 'to repair to Westerhall, and inspect and measure the work performed there by the pursuer for the late Sir John Lowther Johnstone, Baronet, and to put a value thereon, according to the price of similar works at the period they were executed in that part of the country, and to report.' Against this remit the trustees reclaimed to the Court, but their Lordships adhered. A report was then made by the valuators, that the total charge for the work was L.3913. On considering this report, with objections, the Lord Ordinary issued a note, that it appeared to him that the libel was not sufficiently broad to comprehend two claims made by Elliot,—one of L.114. 12s. 1d. for plans, travelling expenses, and other charges, and another of L.90. 3s. 3d. for foreign wood. Elliot then lodged an amendment of the libel, including these two sums; and after the conclusion for L.3300, he proposed to insert this alternative, 'or such other sum, less or more, as shall be found to be due to the pursuer, including the above-mentioned two sums of L.90. 3s. 3d. and L.114. 12s. 1d.'

June 22. 1824. The Lord Ordinary then pronounced an interlocutor, by which he 'allowed the amendment of the libel now offered on 'the part of the pursuer to be received, and allowed the same to 'be seen till next calling.' No objections were offered, and Elliot having discovered that the claim for L.90. 3s. 3d. was already embraced under the libel, lodged a minute, proposing to withdraw it from the amendment, and craving decree for the sum reported by the valuators, together with the account of L.114. 12s. 1d., under deduction of partial payments amounting to L.2550. This minute was allowed to be seen and answered; but no answers having been lodged, the Lord Ordinary decerned for the above sums, under deduction of the partial payments. Against this judgment the trustees lodged a representation, on advising which his Lordship found, 'that after 'the letters of 24th and 27th July 1810 had been sent and 'received, the pursuer could not have compelled Sir John John-'stone to settle with him according to the estimates which had 'been given in, or on any other principle than that Sir John 'should pay for the actual value of the work done, according 'to the measurement and report of skilful tradesmen: That 'the pursuer's letter to Mr Ure of the 21st of March 1811 could 'not alter the rights of parties as fixed by the previous cor-'respondence above referred to: That no particular objec-'tions have been stated to the report of Messrs Laing and 'Johnstone, from which report it appears accordingly, that the 'representers are only required to pay the actual value of the 'work done, and that a great part of the work besides is not 'included in the estimates;' and therefore refused the represen-tation.

The trustees then presented a petition to the Court, and hitherto no objection had been made to the amendment; but when the case came on for advising, it was objected to as incompetent. The Court adhered, so far as the interlocutor decerned 'for payment to the extent of the sum concluded for in the 'original libel, being L.3300 sterling, under deduction of the 'partial payments;' and 'remitted to the Lord Ordinary to hear 'parties farther as to the respondent's claim under the amend-'ment of the libel, and do as he shall see cause.' The case having returned to the Lord Ordinary, his Lordship pronounced this judgment:—'Finds, that the amendment of the libel, in so 'far as now insisted in by the respondent, relates to a sum of 'L.114. 12s. 1d. as the amount of an account for plans, travel-'ling expenses, and other charges: finds, that no particular

June 22. 1824.

'objection was stated to this account, or the charges in it, by the 'petitioners; but that the Lord Ordinary having, in his note of 'the 21st December 1816, suggested a doubt whether this ac- 'count, and another small account not now insisted in, were 'comprehended under the conclusions of the original libel, the 'respondent put in an amendment of the libel, concluding for 'payment of these two separate accounts, neither of which had 'any connexion with the work reported on by Messrs Laing and 'Johnstone,* which had previously formed the only subject of 'litigation between the parties: Finds, that the amendment of the 'libel was allowed to be seen by interlocutor of the 22d of 'January 1817; but that the objection now offered to it by the 'petitioners, viz. that it was not competent to give in the amend- 'ment of the libel at the late period of the cause in which the 'amendment was put in, was not stated to the Lord Ordinary, 'either at Bar, or in the representations which followed after the 'amendment was allowed to be seen, nor is any such objection 'stated in the petition to the Court: And in respect it appears 'to the Lord Ordinary, that it was competent to the respondent, 'against whom, as pursuer of the action, the objection, if 'competent and omitted, would not have applied to bring forward 'this new claim, after parties had joined issue on the other 'matters; and also, that the petitioners, who were allowed to 'see the amendment, but did not at that time offer any objection 'in point of form to its being received, cannot now be permitted 'to urge this formal objection—refuses the desire of the petition 'as to the respondent's claim under the amendment of the libel, 'and adheres to the interlocutor reclaimed against.' The trustees then reclaimed to the Court; but their Lordships, on advising the petition with answers, on the 7th June 1821, adhered.

Lord Craigie was of opinion, that under the first conclusion an amendment was not necessary; but the other Judges dissented; and all agreed that, except for the conduct of the trustees, which barred them from objecting to it, the amendment was incompetent, seeing that the report of the valuators was equivalent to a proof.*

The trustees then appealed to the House of Lords, and maintained,—

1. That Elliot was bound to abide by the account which he had originally rendered, shewing that the total charge was only

---

* 1. Shaw and Ballantine, No. 63.

June 22. 1824.

L.2633, and was not entitled to resort to the report of the valuators, which stated that the total charge was L.3913.

2. That at all events the amount of that charge must be limited to the sum of L.3300, which he himself had specified in his summons as the utmost amount of his claim. And,

3. That as the report of the valuators was equivalent to a proof, and so litiscontestation had taken place, it was not competent for Elliot to amend his libel at that stage of the process, so as to make it coincide with the amount reported by the valuators: that although the Lord Ordinary had allowed the amendment to be received, yet it had never been admitted as part of the libel; and therefore they could not be barred from objecting to its being admitted at any time prior to this being actually done.

On the other hand, Elliot contended,—

1. That as the account which he rendered was intended merely as a vidimus, to shew that at least more than L.1000 was due to him, he could not be foreclosed by it.

2. That although it was true he had underrated the value of the work which he had performed in his summons, yet he had an alternative conclusion for payment of such sum as should be ascertained by the report of valuators, (to which mode of proof Sir John Lowther Johnstone had expressly agreed), and therefore he could not be barred from getting what was justly due to him by having made a mistake as to the value of the work. And,

3. That the summons was sufficiently broad without an amendment; but at all events, as a remit to valuators could not be considered as equivalent to a proof, and so litiscontestation had not taken place, the amendment was quite competent; but supposing that it were not so, the trustees must be held to have agreed to its being received, because they allowed the interlocutor permitting it to be received to become final, and stated no objection till after judgment on the merits had been pronounced by the Lord Ordinary, and the Court were about to adhere to that interlocutor.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

Appellants' Authorities.—4. Stair, 39. 2; 4. Ersk. 1. 69.

Respondent's Authorities.—Douglas, Dec. 23. 1693, (12,148.); Meldrum, July 28. 1716, (12,152.); Kinniburgh *v.* Earl of Morton, June 13. 1820, (not reported).

J. CAMPBELL—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 77.)

ARCHIBALD WALLACE, for himself and WALLACE, CAMPBELL and Company, Appellant.—*More.*

CHARLES CAMPBELL, Trustee for JOHN HAMILTON and Company, Respondent.—*Cockburn—Rutherford.*

No. 55.

Partnership—Competition—Bankrupt—Title to Pursue.—A partner of a Company having entered into a joint adventure with another, and made use of the name and credit of the Company; and the estates of the Company having been sequestrated, and a separate sequestration awarded against the partner, and different trustees having been appointed; and the trustee of the Company having raised an action against the other joint adventurer to account to him, and on the dependence arrested dividends due to the joint adventurer out of the estates of a sequestrated Company; and that joint adventurer having previously granted an assignation of these dividends to another party, and delivered relative dishonoured bills accepted by the sequestrated Company, which had been originally indorsed away and discounted by the joint adventurer, but had been returned on him; and the assignation not having been intimated till subsequent to the arrestments;—Held, (affirming the judgment of the Court of Session), That the arrestments by the trustee for the Company were preferable both to the assignation and bills held by the party acquiring them from the joint adventurer.

June 23. 1824.

1ST DIVISION. Lord Gillies.

HUGH and WILLIAM HAMILTON were the partners of a Company which carried on business, in Greenock under the firm of John Hamilton and Company, and in Liverpool under that of William Hamilton and Company. The former of these branches was managed by Hugh Hamilton, and the latter by William Hamilton; and it was alleged that the partners were bound not to engage in any business on their private account. Hugh Hamilton, however, became a partner of Hyde and Company, merchants in Greenock, and embarked in a joint adventure with Boyd Dunlop and Company, merchants in Glasgow. In the prosecution of this joint adventure, Hugh Hamilton made use of the name and credit of John Hamilton and Company. Accordingly all the goods were purchased, and the invoices granted, and the bills accepted, either under the firm of John Hamilton and Company, or under that of Boyd Dunlop and Company—the name of Hugh Hamilton not being mentioned.

On the 2d of August 1814, Hugh Hamilton addressed a letter to Boyd Dunlop, the leading partner of Boyd Dunlop and Company, in which, after mentioning that he had experienced certain misfortunes, he stated, 'I wish, as soon as you 'can, you would send me J. H. and Co's account-current, cal-'culating interest to this time. The tobacco concern I wish